UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

ANTHONY PAGANAS,

Plaintiff,

v.

TOTAL MAINTENANCE SOLUTION, LLC, ARON WEBER, and REGGIE TARTAGLIONE,

Defendants and Third Party Plaintiffs,

v.

ST. JOHN'S UNIVERSITY, NEW YORK

Third-Party Defendant.

15-CV-5424 (JBW)(LB)

MEMORANDUM OF LAW IN SUPPORT OF ST. JOHN'S UNIVERSITY, NEW YORK'S MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF THIRD-PARTY PLAINTIFFS PURSUANT TO FED. R. CIV. P. 56

Third-Party Defendant/Counterclaimant St. John's University ("SJU") respectfully submits this memorandum of law in support of its motion for summary judgment dismissing defendant Total Maintenance Solution, LLC's third-party indemnification claim against SJU.

PRELIMINARY STATEMENT

Total Maintenance Solution, LLC ("TMS")[1] provided maintenance and janitorial services to SJU pursuant to a Services Agreement ("The Agreement"). Plaintiff Anthony Paganas ("Paganas" or "Plaintiff"), was a TMS employee assigned to SJU's Queens campus to supervise TMS maintenance workers. Paganas alleges that TMS misclassified him as an exempt employee under wage and hour laws, and thus failed to pay him overtime wages. TMS' third-party complaint purports to implead SJU in a misguided effort to have SJU indemnify TMS for TMS' unlawful conduct, despite that it is SJU which is entitled to indemnification from TMS.

TMS does not and cannot identify any section of the Agreement that requires SJU to indemnify TMS for anything, much less TMS' own failure to properly pay its employee, Paganas. *To the contrary, the Services Agreement provides a broad indemnification in favor of SJU*, explicitly requiring TMS to indemnify, defend, and hold SJU harmless from all claims "in connection with [TMS]'s performance under the Agreement, including any and all *claims by the ... Supervisors concerning their ... employment....*" TMS, through one of its principals, who is a licensed attorney and was responsible for reviewing TMS' contracts, conceded at TMS' 30(b)(6) deposition that Paganas' lawsuit is an "employment claim." Accordingly, TMS must indemnify SJU for TMS' violation (if any) of wage payment laws.

Nonetheless, TMS brazenly seeks to turn the Agreement on its head, and *obtain* from SJU what it is obligated to *provide* SJU: indemnification for its (TMS') own alleged failure to

[1] TMS principals Aron Weber and Reggie Tartaglione are also defendants / third-party plaintiffs / counterclaim defendants, and thus TMS, Weber, and Tartaglione are referred to collectively as "TMS."

comply with federal and state wage payment laws. Because the plain meaning of the indemnification language in the Agreement obligates TMS to indemnify SJU for TMS' alleged violation of employment laws regarding the misclassification of its employee, the Court should grant SJU's summary judgment motion and dismiss TMS' third-party complaint in its entirety and with prejudice.

FACTS

Under the Agreement between TMS and SJU, TMS agreed to provide, *inter alia*, janitorial services utilizing TMS employees. (*See* SJU's R. 56.1 Statement, ¶¶ 14, 16.) TMS' employees included "Maintenance Engineers"[2] who cleaned and maintained SJU's premises, and Supervisors such as Paganas, who were responsible for supervising the Maintenance Engineers. (*Id.* at ¶ 16.)

Pursuant to the Agreement, TMS was the *sole* employer of the Maintenance Engineers and Supervisors, including Paganas. (*Id.* at ¶¶ 16, 26.) Accordingly, TMS had the legal and contractual obligation to "timely pay the wages of all … Supervisors," and to "comply with all federal, state, and municipal laws in doing so," which TMS understood *and acknowledged at deposition*. (*Id.* at ¶ 30.)[3] Here, Paganas claims that TMS misclassified him as exempt, and thus did not pay him overtime wages in violation of federal and state employment laws. (*See* Complaint, Dkt. 1.)

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[2] Maintenance Engineers were union-represented workers whose terms and conditions of employment were established by a collective bargaining agreement between TMS and Local 32 B-J, S.E.I.U. (*See* SJU's R. 56.1 Statement, ¶ 19.)

[3] TMS was contractually bound to "comply with all federal, state and municipal laws, codes, rules and regulations" applicable to the Basic Services, including wage payment laws which required TMS to properly classify and pay its employees. (*Id.* at ¶ 15.) TMS concedes that SJU did not instruct TMS to classify Paganas as exempt (which was TMS' sole responsibility). (*Id.* at ¶ 33.)

The Agreement is a "cost-plus-three-percent-markup" contract.[4] (*See* SJU's Rule 56.1 Statement, ¶ 20.) It is undisputed that SJU paid TMS all such costs that TMS invoiced to SJU, including for the wages of Paganas. (*Id.* at ¶ 32.) Thus, TMS does not contend that SJU ever failed to pay all costs "related to the payment of Maintenance Engineers and Supervisors," as required by the Agreement. (*Id.* at ¶ 20) Rather, TMS is seeking indemnification from SJU for TMS' breach of the Agreement and violation of law when it allegedly misclassified Plaintiff as exempt from overtime wages. (*See* TMS' Answer and Third-Party Complaint, Dkt. 9.)

Precisely to protect itself from TMS' breaches of contractual and legal obligations, including unlawful wage payment practices, SJU insisted on the inclusion of a broad indemnification clause in the Agreement, which provides as follows:

> In addition to any liability or obligation of Service Company to STJ under other provisions of this Agreement or at law, *Service Company shall to the fullest extent permitted by law, indemnify, defend, and hold STJ, its Board of Trustees, officers, employees, Service Companys and servants harmless from and against all claims, suits, damages, liabilities, losses, demands, costs and expenses, including reasonable attorneys' fees and disbursement, and punitive damages of every kind and nature, by or on behalf of any person, firm, association or corporation, in connection with Service Company's performance under the Agreement, including any and all claims by the Maintenance Employees and Supervisors concerning their hiring, employment, or separation therefrom*, and claims by the Union or its various benefits funds in any form (including without limitation in court, arbitration, or before a government agency).

(*Id.* at ¶ 22.)

Here, there is no dispute that Paganas' lawsuit is "in connection with [TMS]' performance under the Agreement," and constitutes an "employment claim." Indeed, at TMS' 30(b)(6) deposition, one of its principals, Dennis Hasher, a lawyer responsible for reviewing TMS' contracts and signing the paychecks distributed to TMS' employees during the period in

[4] At no time pertinent to the Agreement was SJU responsible for paying wages directly to TMS employees. (*See* SJU's Rule 56.1 Statement, ¶ 34.)

question, confirmed under oath that Paganas' suit is an "employment claim." (*See.* SJU's Rule 56.1 Statement, ¶ 7.) Thus, rather than TMS being entitled to indemnification from SJU in this case, TMS is contractually obligated to indemnify, defend and hold harmless SJU from the claims and damages of Paganas, which arise (if at all) out of TMS' violation of the employment laws regulating wages and hours—the Fair Labor Standards Act and New York Labor Law. (*See* Cooper Decl., Ex. 4.)

ARGUMENT

I. Summary Judgment[5] Should Be Granted to SJU

A. TMS Must Indemnify SJU, Not The Other Way Around.

The Agreement contains only one indemnification provision, and that clause broadly and unambiguously obligates TMS to indemnify SJU "from and against all claims… in connection with [TMS'] performance under the Agreement, including any and all claims by the Maintenance Employees and Supervisors concerning their hiring, employment or separation therefrom…." (*See* SJU's R. 56.1 Statement, ¶ 22.) The Agreement does not include any reciprocal commitment on the part of SJU to indemnify TMS for any reason.

[5] Summary judgment is appropriate where, as here, the moving party demonstrates that there is no genuine issue of material fact, and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In order to avoid summary judgment, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); and present evidence that would allow a jury to find in its favor, *Graham v. L.I.R.R.*, 230 F.3d 34, 38 (2d Cir. 2000). The primary issue presented to the Court on a motion for summary judgment with respect to a contract claim is "whether the contract is unambiguous with respect to the question disputed by the parties." *Law Debenture Trust Co. v. Maverick Tube Corp.*, 595 F.3d 458, 465 (2d Cir. 2010). Contract claims are ideal for disposition at the summary judgment stage, particularly where, as here, the terms of the contract are clear and unambiguous. *See Roberts v. Edith Roman Holdings, Inc.*, No. 10 Civ. 4457 (LAP), 2011 WL 2078223, at *2 (S.D.N.Y. May 19, 2011); *Battery Assocs. v. J&B Battery Supply*, 944 F. Supp. 171, 176 (E.D.N.Y. 1996).

Here, Paganas alleges that TMS failed to pay him overtime wages that TMS, as Paganas' sole employer, was contractually and legally obligated to pay him in accordance with applicable laws. TMS concedes that it, like any other employer, was "required to make a determination as to whether or not its employees were exempt" from applicable wage and hour laws. (*See* SJU's Rule 56.1 Statement, ¶ 30.) TMS also concedes that Paganas' lawsuit, as it pleads claims under the Fair Labor Standards Act and New York Labor Law, constitutes an "employment claim" – which is expressly covered by the Agreement's indemnification provision. Accordingly, if TMS failed to pay Paganas appropriate wages under federal and state laws, then TMS has no basis to seek reimbursement/indemnification from SJU.[6] To the contrary, TMS would be required to indemnify SJU (if SJU was sued by Paganas, which it was not).

Nothing in the Agreement requires SJU to reimburse and/or indemnify TMS for its failure to pay appropriate wages to Paganas. Any such requirement would render meaningless SJU's contracutal rights under the indemnification provision in the Agreement. New York courts "are loathe to interpret a contract in such a way." *Atlantis Info. Tech. v. CA, Inc.*, No. 06 Civ. 3921(JS), 2011 WL 4543252, at *8 (E.D.N.Y. Sept. 28, 2011); *see also Manley v. AmBase Corp.*, 337 F.3d 237, 250 (2d Cir. 2003) (New York law "disfavors interpretations that render the contract provisions meaningless or superfluous"); *Georgia-Pacific Consumer Prods., LP v. Int'l Paper Co.*, 566 F. Supp. 2d 246, 251 (S.D.N.Y. 2008) ("[R]eading an entire agreement, a court must strive to give full meaning and effect to all of its provisions. It is a cardinal rule of construction that a court adopt an interpretation that renders no portion of a contract meaningless.")

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[6] Indeed, TMS is unable to identify any section of the Agreement that requires SJU to indemnify TMS *for any reason*. (*See* SJU's R. 56.1 Statement, ¶ 37.) Under TMS' logic, SJU would also be liable for reimbursement and indemnification in the event that TMS were to be sued for making impermissible deductions to employees' wages or even engaging in outright wage theft. Although the very idea seems farcical, it represents the logical extension of TMS' position with respect to its claim against SJU.

As such, SJU is entitled to the benefit of its bargain, which in this case means that SJU is entitled to summary judgment with respect to TMS' claim.

B. TMS' Contention That Paganas' Overtime Claim Does Not Fall Within the Indemnification Provision Must Be Rejected

SJU anticipates that TMS may contend that its failure to abide by wage and hour laws does not fall within the broad indemnification clause running in favor of SJU. This contention cannot withstand even a modicum of scrutiny.

The indemnification provision imposes upon TMS the obligations of indemnification, defense and hold harmless "to the fullest extent permitted by law," in connection with any claims arising out of "Service Company's performance under the Agreement," including "any and all claims by the Maintenance Employees and Supervisors concerning their hiring, *employment*, or separation therefrom…." (*See* SJU's R. 56.1 Statement, ¶ 22.) TMS concedes that Paganas' lawsuit constitutes an "employment claim." (*Id.* at ¶ 7.) Moreover, this Court recently interpreted a similarly broad clause in an analogous context earlier this year.

In *Bynum v. Maplebear Inc.*, 15-CV-6263 (JBW), 2016 WL 552058 at *12 (E.D.N.Y. Feb. 12, 2016), this Court reviewed an agreement which required the parties to submit to arbitration any dispute "*arising out of or relating to the Services performed by Contractors*." The dispute at issue there, like here, was an employee's wage and hour claim. This Court held that such a claim fell squarely within the scope of the parties' arbitration agreement, and dismissed the lawsuit (in favor of arbitration).

Here, not only does the Agreement provide for indemnification of any claim arising out of the performance of TMS' services, but it explicitly, clearly and unambiguously obligates TMS to indemnify SJU from all claims "concerning" the "employment" of TMS Supervisors, and to do so "to the fullest extent permitted by law."[7] (*See* SJU's Rule 56.1 Statement, ¶ 22.) Just as this Court reasoned in *Bynum* that the plaintiff "[could] not argue that her FLSA claims do not fall within the scope of the Agreement's arbitration clause," here, TMS likewise cannot establish that Paganas' claim falls outside the scope of the indemnification provision. *Id.* Accordingly, the indemnification provision contained in the Agreement must be read in the ***only*** way that is reasonable under the circumstances—to protect SJU from any liability resulting from TMS' employment practices. Indeed, the very reason for the inclusion of the indemnification provision in the Agreement was to protect SJU from any liability stemming from TMS' practices—including misclassification—with respect to TMS' employees, such as Paganas.

C. TMS Cannot Identify Any "Practice" By Which SJU Reimbursed or Indemnified TMS for Any Settlement or Judgment Awarded to a TMS Employee.

TMS also may contend that the practices between the parties thwart SJU's entitlement to indemnification, and strengthen its contention that the Agreement is ambiguous.[8] Nothing can be further from the truth.

At its 30(b)(6) deposition, TMS was asked in plain language to provide the basis for its claim that it is entitled to reimbursement and indemnification from SJU. (*Id.* at ¶¶ 37-38.) In response, TMS' designated witnesses were unable to identify any language in the Agreement that supports TMS' claim for reimbursement and indemnification. (*Id.* at ¶ 37-38.) Although TMS alleges that the practices between the parties provide support for its claim, when asked for specifics, ***TMS was unable to identify so much as one occasion on which SJU indemnified TMS or otherwise reimbursed TMS as contribution toward a settlement or judgment paid by TMS.*** (*See* SJU's Rule 56.1 Statement, ¶¶ 37-41.)

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[7] Concerning the indemnification provision, TMS' 30(b)(6) witness testified: "To the extent that I considered that paragraph to be applicable, that is I actually felt that we … were indemnifying St. John's if there were some damages associated with that, meaning if the plaintiff suffered some compensable damages, then we would be responsible for those damages. I guess 'damages' [as used in the imdenification provision] means damages." (*See* SJU's R. 56.1 Statement, ¶ 41.)

[8] However, Paragraph 4.6(a) of the Agreement provides that the Agreement may not be modified unless such modification is "made by supplemental agreement in writing executed by" SJU and TMS. (*Id.* at ¶ 23.)

Unable to identify any practices supporting its claims, TMS consequently fails to establish a genuine issue of material fact with respect to its claims against SJU.

CONCLUSION

Stripped to its core, TMS' third-party complaint amounts to nothing more than an ill-conceived attempt to rewrite its Agreement with SJU. Based on the plain language of the Agreement and the only reasonable interpretation of same, there are no genuine issues of material fact, and SJU is entitled to summary judgment dismissal of the third-party complaint.

Accordingly, for the reasons set forth above, SJU respectfully requests that the Court grant SJU's motion for summary judgment in all respects and award SJU whatever further relief that it deems just and proper.

Dated: September 12, 2016

Respectfully submitted,

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